91-383

(1)

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1991

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF REVENUE, and
EILEEN McNULTY,
Secretary of Revenue,
Petitioners

v.

BLOOMINGDALE'S BY MAIL, LTD.,
Respondent

On Petition for Certiorari To the
Supreme Court of Pennsylvania

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the holding in National Bellas Hess v. Department of Revenue, 386 U.S. 753 (1967)--that mail-order sellers are exempt from collecting state use taxes unless they have some physical presence within the taxing State--should be reconsidered in light of the technological and other changes in the 24 years since National Bellas Hess was decided?

2. Whether, even under National Bellas Hess, a mail-order seller is exempt from collecting state use taxes where the seller, although separately incorporated, is closely tied to a well-known retailer with stores in the taxing State, and uses that retailer's name and logo?

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OPINIONS BELOW

The Supreme Court of Pennsylvania decided this case by a per curiam order, Pet. App. 1a, without an opinion. The opinion of the Commonwealth Court of Pennsylvania is reported at 130 Pa. Commonwealth Ct. 190, 567 A.2d 773, and is reprinted in the Appendix at p. 2a.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on June 4, 1991, Pet. App. 1a, and this petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Constitution provides in relevant part that "[t]he Congress shall have the power . . . to regulate commerce . . . among the several States. . .," Art. I, § 8, cl. 3; and that "[n]o State shall . . . deprive any person of . . . property without due process of law. . .," Amend. XIV, §1.

2. The Pennsylvania Tax Reform Code of 1971, Pa. Stat. Ann. tit. 71, §§ 7101 through 10004 (Purdon 1990), provides in relevant part as follows:

§ 7201. Definitions

> The following words, terms and phrases. . . shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:
>
> . . .
>
> (b) "Maintaining a place of business in this Commonwealth."
>
> (1) Having or maintaining within this

Commonwealth, directly or by a subsidiary, an office, distribution house, sales house, warehouse, service enterprise or other place of business, or any agent of general or restricted authority irrespective of whether the place of business or agent is located here pemanently or temporarily or whether the person or subsidiary maintaining such place of busines or agent is authorized to do business within this Commonwealth; or

(2) The engaging in any activity as a business within this Commonwealth by any person, directly or by subsidiary, in connection with the lease, sale or delivery of tangible personal property or the performance of services thereon for use, storage or consumption including, but not limited to, having, maintaining or using any office, distribution house, sales house, warehouse or other place of business, any stock of goods or any solicitor, salesman, agent or representative under its authority, at its direction or with its permission, regardless of whether the person or subsidiary is authorized to do business in this Commonwealth.

(3) Regularly or substantially soliciting orders within this Commonwealth in connection with the lease, sale or delivery of tangible personal property to or the performance thereon of services for residents of this Commonwealth by means of catalogues or other advertising, whether such orders are accepted within or without this Commonwealth.

§ 7202. Imposition of Tax.

....

(b) There is hereby imposed upon the use. . . within this Commonwealth of tangible personal property purchased at retail . . . and on those services described herein purchased at retail. . ., a tax of six per cent of the purchase price. . . .

§ 7206. Credit against tax

A credit against the tax imposed by this act shall be granted . . . equal to the tax paid to another state by reason of the imposition by such other state of a [similar] tax . . . [if] such other state grants substantially similar tax relief. . . .

§ 7208. Licenses

(a) Every person maintaining a place of business in this Commonwealth, selling or leasing services or tangible personal property, the sale or use of which is subject to tax. . . , shall, . . . make application to the department [of Revenue], on a form prescribed by the department, for a license.

§ 7227. Discount

[T]he licensee shall be entitled to credit and apply against the tax payable by him a discount of one percent of the amount of the tax collected by him . . . , as compensation for the expense of collecting and remitting the same. . . . .

§ 7237. Collection of tax

. . . .

(b) Collection by Persons Maintaining a Place of Business in the Commonwealth.

(1) Every person maintaining a place of busines in this Commonwealth and selling or leasing tangible personal property or services

. . . the sale or use of which is subject to tax shall collect the tax from the purchaser or lessee at the time of making the sale or lease, and shall remit the tax to the department.

STATEMENT OF THE CASE

1. This case arises out of Pennsylvania's attempts to require the respondent, Bloomingdale's By Mail Ltd., to collect and remit use taxes on its mail-order sales of merchandise to Pennsylvania residents. A State may require an out-of-state seller to do so only if the seller has a sufficient "nexus" with the taxing State to satisfy the demands of the Commerce and Due Process Clauses; the issue in this case is whether Bloomingdale's By Mail has such a nexus with Pennsylvania.

a. Pennsylvania, like all states that impose a sales tax, imposes a corresponding use tax on goods bought outside the Commonwealth, "in order to protect sales tax revenues and put local retailers on a competitive level with out-of-state retailers who are exempt

from sales tax." Pet. App. 11a; Pa. Stat. Ann. tit. 72, § 7202 (Purdon 1990). The tax rate in Pennsylvania is six per cent. Ibid. A credit against the tax is allowed for any similar tax paid to another State, so long as that State reciprocates. Id., § 7206. The tax is collected by sellers, who are licensed for that purpose by the Pennsylvania Department of Revenue, id., §§ 7208, 7237, and who are permitted to retain one per cent of the tax collected as compensation for their expenses. Id., § 7227.

b. Bloomingdale's By Mail Ltd. operates a nationwide mail-order business. Pet. App. 6a. It is a New York corporation, ibid, and a wholly owned subsidiary of Federated Department Stores, Inc. (Federated), a Delaware corporation with which it shares

overlapping directors and officers. Pet. App. 7a. Another subsidiary of Federated, Bloomingdale's, Inc., operates the Bloomingdale's department stores, two of which are located in Pennsylvania. Pet. App. 8a-9a; R. 170a. [1]

Until 1983, the Bloomingdale's department stores and the Bloomingdale's mail-order business were run by the same entity, then known as the Bloomingdale's Division of Federated. R. 166a, 170a. In 1983, the mail order business was incorporated as Bloomingdale's By Mail, Inc., which in turn was succeeded in 1984 by the respondent, Bloomingdale's By Mail Ltd. R. 165a. The Bloomingdale's department stores continued to be operated by the Bloomingdale's Division;

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[1] The designation "R. ____a" refers to the Reproduced Record filed in the Supreme Court of Pennsylvania.

in 1988, the Division too was incorporated as Bloomingdale's, Inc., another wholly owned subsidiary of Federated. R. 170a.

Bloomingdale's By Mail solicits orders for the purchase of merchandise only through its mail-order catalogs, which it regularly mails to Pennsylvania residents, Pet. App. 8a, sells to retail news dealers, R. 176a-177a, and advertises in magazines and newspapers. R. 170a. It accepts mail and telephone orders at facilities in Connecticut, and ships the merchandise to fill these orders into Pennsylvania by mail and common carier. Pet. App. 6a. Bloomingdale's By Mail has no store, warehouse, office or other facility in Pennsylvania; it has no employees in Pennsylvania; and its catalogs are

designed, printed and mailed from outside the Commonwealth. Pet. App. 8a-9a.

Bloomingdale's By Mail does, however, maintain ties with Bloomingdale's, Inc., which operates two Bloomingdale's department stores in Pennsylvania. Bloomingdale's By Mail is permitted, for a fee, to use the Bloomingdale's name and mark, Pet. App. 19a, which appear in all of its catalogs and advertising, as well as in the advertising for the Bloomingdale's department stores. R. 52a, 54-55a, 170a, 178a. The mail-order catalog and its advertising emphasize this connection with the department stores, describing the catalog as a "convenient way to shop for the fashion fantasy and fond familiars otherwise found only in . . . our renowned stores," R. 48a, and inviting

mail-order shoppers to "open a Bloomingdale's near you" by using the catalog. R. 170a. The mail-order catalog and the department stores share common marketing campaigns and themes. Pet. App. 19a; R. 52a, 189a, 191a-192.

Bloomingdale's By Mail accepts the credit card used by Bloomingdale's, Inc., Pet. App. 7a, and sells to Bloomingdale's, Inc. all accounts receivable that result from the use of that card. R. 168a. It issues applications for the Bloomingdale's credit card, but those applications are approved or rejected only by Bloomingdale's, Inc. R. 167a.

Under an agreement between the two subsidiaries, Bloomingdale's By Mail uses the department stores' buyers to purchase the merchandise offered in the mail-order catalog. The buyers work under the direction of a Bloomingdale's By Mail

vice-president, who makes all final decisions. R. 177a-178a. Some merchandise offered in the catalogs is also available in the Bloomingdale's department stores, and some is not; some catalog merchandise is also available from retailers other than Bloomingdale's. R. 168a.

The mail-order catalog of Bloomingdale's By Mail directs all customer requests for exchanges, returns and other assistance to its Connecticut facilities. R. 171a. On some occasions, however, employees at Bloomingdale's department stores have in fact accepted for return merchandise ordered from Bloomingdale's By Mail, and have issued refunds on it. Pet. App. 8a-9a; R. 17a-175a.

c. In the five years from 1983 through 1987, yearly sales to Pennsylvania residents by Bloomingdale's

By Mail and its predecessor more than tripled, from about $1 million to about $3.4 million. R. 166a. In 1985, the Department of Revenue asked Bloomingdale's By Mail to begin collecting use tax on its mail order sales to Pennsylvania residents, or to advise its Pennsylvania customers of their obligation to pay the use tax, or to give the Department information on its Pennsylvania customers so that the Department itself could issue tax assessments. R. 180a-181a. Bloomingdale's By Mail refused all of these requests, on the ground that there was an insufficient nexus between itself and Pennsylvania to permit the Commonwealth constitutionally to impose such obligations upon it. Ibid. Bloomingdale's By Mail then filed this action in the Commonwealth Court of

Pennsylvania, seeking a declaratory judgment to that effect. R. 7a-9a.

2. The Commonwealth Court, sitting en banc and without dissent, held in favor of Bloomingdale's by Mail. Pet. App. 2a-22a. The court cited National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967), for the proposition that no sufficient nexus exists for a seller whose only contact with the taxing State is through the mail or common carrier. Pet. App. 14a.

The court then turned to the relationship between Bloomingdale's By Mail and Bloomingdale's, Inc., which operates two department stores in Pennsylvania. The court acknowledged such cases as National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977)(in-state presence of offices unrelated to mail-order operation

established nexus) and Scripto, Inc. v. Carson, 362 U.S. 207 (1960)(in-state presence of independent contractors established nexus), Pet. App. 15a, 20a, but distinguished them from this case. The court held that the Bloomingdale's stores in Pennsylvania "do not solicit orders on [Bloomingdale's] By Mail's behalf nor act as its agents in any fashion and [Bloomingdale's] By Mail does not solicit orders for Bloomingdale's." Pet. App. 8a. The various ties between Bloomingdale's By Mail and the Bloomingdale's stores -- the sharing of a common name and logo, common advertising campaigns, common credit card, and the organizational ties discussed above -- did not, in the Commonwealth Court's view, suffice to create a nexus between Bloomingdale's By Mail and Pennsylvania. Pet. App. 18a-19a.

The court therefore declared that the imposition upon Bloomingdale's By Mail of the obligation to collect Pennsylvania's use tax would violate the United States Constitution. [2] Pet. App. 22a.

3. On appeal, the Supreme Court of Pennsylvania affirmed the Commonwealth Court by a per curiam order issued without an opinion. Two justices would have dismissed the appeal as moot. Pet. App. 1a.

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[2] In its complaint, Bloomingdale's By Mail had also raised claims under the Pennsylvania Constitution, R. 7a-8a, but the Commonwealth Court did not discuss these claims; both its judgment order and its opinion rest solely on the federal constitutional claims. Pet. App. 22a, 23a-24a.

REASONS FOR GRANTING THE WRIT

It has been nearly a quarter of a century since the Court held, in National Bellas Hess v. Department of Revenue, 386 U.S. 753 (1967), that mail order sellers could not be required to collect and remit state use taxes unless they had some physical presence within the taxing State; and the Court has not re-visited the issue since then. The petitioners submit that the time has come for the Court to re-consider in the light of experience the utility of National Bellas Hess and to overrule or modify it. At the very least, the Court should head off the attempt, which this case exemplifies, to manipulate the National Bellas Hess rule by creatively revamping corporate structures to avoid use taxes.

I. THE COURT SHOULD RECONSIDER NATIONAL BELLAS HESS V. DEPARTMENT OF REVENUE IN LIGHT OF THE TECHNOLOGICAL AND OTHER DEVELOPMENTS WHICH HAVE OVERTAKEN IT, THE GROWING BURDEN IT PLACES ON STATE TAX REVENUES, AND THE CONFLICTING DECISIONS IT HAS SPAWNED IN THE LOWER COURTS.

1. Over the years, the Court has expressed in a variety of ways the limits which the Constitution places on the States' ability to tax interstate commerce. See Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954)(Constitution requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax"); Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940)("simple but controlling question is whether the state has given anything for which it can ask return.") Most recently, the Court has asked

whether "the tax is applied to an activity with a substantial nexus with the taxing State...." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

In National Bellas Hess, supra, the Court applied these ideas to draw a "sharp distinction . . . between mail order sellers with retail outlets, solicitors or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier." Id., at 758. The former, said the Court, have the requisite nexus with the taxing State to subject them to use tax obligations, but the latter do not.

The Court's reliance in National Bellas Hess on physical presence as the touchstone for nexus analysis was severely criticized at the time, as

lacking "a realistic approach to the facts of . . . business . . . ." Id., at 760 (Fortas, J., dissenting). The dissenting Justices felt "no doubt" that the "large-scale, systematic, continuous solicitation of the . . . consumer market is a sufficient 'nexus' to require" a mail order seller to collect and remit use taxes. Id., at 761. That criticism has continued, see, e.g., P. Hartman, Collection of the Use Tax on Out-of-State Mail-Order Sales, 39 Vand. L. Rev. 993 (1986); S. McCray, Overturning Bellas Hess: Due Process Considerations, 1985 B.Y.U.L. Rev. 265; and has gained force from events in the 24 years since the Court last considered this issue.

First, National Bellas Hess rests on an increasingly outmoded view of the facts of doing business. The very term "mail-order" is fast becoming an

anachronism as applied to today's sophisticated direct marketing operations; not only mail, but toll-free "800" numbers, fax machines, and home shopping by computer, are making physical presence increasingly irrelevant. The Court itself, in the related context of the due process limitations on long-arm jurisdiction, has recognized that

> Jurisdiction . . . may not be avoided merely because the defendant did not physically enter the forum State. . . . [I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communciations across state lines, thus obviating the need for physical presence within a State in which business is conducted.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (emphasis in original). National Bellas Hess has thus become not only an anachronism but an anomoly.

Second, the approach in National Bellas Hess underrates the very real benefits that mail-order operations derive from the States in which they do business. It is just not true that absent some physical presence--a building or a salesman -- a State gives nothing for which it may fairly ask a return. Direct-mail businesses are engaged in the continuous and systematic exploitation of the States' consumer markets. While they may not need police and fire protection, they do benefit from such things as state consumer protection laws, which bolster the consumer confidence on which their businesses rest; state-regulated credit and banking institutions, without which their businesses would be impossible; access to state court systems to collect their accounts, without which those

accounts would be worthless; [3] and, as one court has pointed out, state disposal of the mountains of solid waste which their catalogs eventually become. See North Dakota v. Quill Corp. 470 N.W.2d 203, 218-19 (1991), petition for cert. filed sub nom. Quill Corp. v. North Dakota, No. 91-194 (Aug. 1, 1991).

Third, the concern expressed in National Bellas Hess over "entangling" mail order sellers "in a virtual welter of complicated obligations to local jurisdictions" id., at 759-60, is far less weighty today than it was a quarter of a century ago. The same advances in computer technology that make possible

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[3] To this last, it is of course no answer to say, as the respondent undoubtedly will, that it conducts no collection activities in Pennsylvania because it sells its accounts receivable. Supra at 13. Those accounts are worth something to a buyer only because Pennsylvania makes it possible to collect them.

the modern direct mail industry of "literally thousands of catalogs targeted at specific groups of consumers," Quill Corp., supra, 470 N.W.2d at 209, also greatly reduce the burden of collecting use taxes on its transactions.[4] E.g., S. McCray, Overturning Bellas Hess, supra, 1985 B.Y.U. L. Rev. at 290.

2. The technological and other developments discussed above provide the foundation for the Court to re-examine National Bellas Hess, but it is economic changes that make it urgent for the Court to do so. The direct mail industry has exploded in the last 24 years. In 1967, when National Bellas Hess was decided, total sales were estimated at $2.4

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[4] Pennsylvania, like other states, further reduces this burden by compensating sellers for their expenses in collecting the tax. Pa. Stat. Ann. tit. 72, § 7227 (Purdon 1990).

billion per year. Id., at 753 (Fortas, J., dissenting). By 1985, they were estimated at as much as $150 billion, P. Hartman, supra, at 1006; and if the experience of the respondent is any guide, that increase has continued. Supra at 14-15.

Large parts of this now-enormous industry operate in a tax-free zone created by National Bellas Hess. P. Hartman, supra, at 1006-07. The loss of tax revenues to the States, and the competitive disadvantages to local businesses, are obvious. In 1985, these lost revenues were already estimated to have reached $1 billion per year. Ibid. Until the error of National Bellas Hess is put right, this hemorrhage can only get worse.

3. Finally, the decision in this case cannot be reconciled with that of

the Supreme Court of North Dakota in North Dakota v. Quill Corp., supra. In Quill, a mail-order seller relied on its lack of a physical presence and National Bellas Hess to escape a state use tax, but the court rejected this attempt. After a lengthy and thoughtful analysis of many of the same factors discussed in this petition, the court concluded that, despite National Bellas Hess,

> the concept of nexus encompasses more than mere physical presence within the state, and that the determination of nexus should take into consideration all connections between the out-of state seller and the state, all benefits and opportunites provided by the state, and should stress economic realities rather than artificial benchmarks.

Id., at 215. The court thus upheld the imposition of use tax obligations. The taxpayer in Quill has petitioned the

Court for certiorari. That petition as well as this one should be granted, so that the Court can review and resolve the difficulties created by National Bellas Hess' increasing obsolescence.

II. THE COURT SHOULD REVIEW THE ISSUE OF WHETHER, EVEN UNDER NATIONAL BELLAS HESS, A BUSINESS MAY ESCAPE STATE USE TAXES MERELY BY SEPARATELY INCORPORATING ITS MAIL-ORDER OPERATION

Short of re-considering National Bellas Hess, the Court should nevertheless review this case to decide whether, even under National Bellas Hess standards, the required nexus exists between Pennsylvania and the respondent.

The Court has already held, in cases involving businesses with both retail stores and mail-order operations, that a business' internal organization or division of functions is not relevant to

nexus analysis. Specifically, "the fact that [a] business [is] departmentalized -- the mail-order and retail stores operations . . . separately administered -- [does] not preclude the finding of sufficient nexus." National Geographic Society v. California Board of Equalizers, 430 U.S. 551, 560 (1977), citing Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941).

Until 1983, the Bloomingdale's mail-order business and the Bloomingdale's department stores -- two of which are in Pennsylvania -- were operated by the same division of the parent corporation. Supra at 10. There is thus no question that, as the respondent's business stood before 1983, it could properly have been required to collect Pennsylvania's use tax. The question is whether the corporate

reorganizations begun in 1983, which eventually resulted in the separate incorporation of both the mail-order and the retail stores operations, supra at 10-11, should change this result.

Bloomingdale's By Mail continues to have close operational ties to the Bloomingdale's retail department stores. Supra at 12-14. More importantly, it continues to rely for its sales on consumer identification of the mail-order operation with the Bloomingdale's department stores; indeed, the mail-order catalog expressly invites consumers to treat it as an extension of the department stores. Supra at 12-13 ("open a Bloomingdale's near you"). So successful is this identification that the department stores' own employees are unsure of the distinction, on which the respondent now relies, between the mail-order and retail store operations. Supra at 14.

The respondent thus seeks the best of both worlds: to rely for its sales on the consumer good will and product identification built up through its in-state retail stores, and yet to escape use tax obligations by distancing itself from those same stores in its corporate structure. It is a pattern that is apparently becoming increasingly common, as businesses seek to exploit to the fullest the tax-free zone created by National Bellas Hess. See SFA Folio Collections, Inc. v. Bannon, 217 Conn. 220, 585 A.2d 666, cert. denied sub nom. Commissioner of Revenue Services v. SFA Folio Collections, Inc., No. 90-1627 (June 17, 1991). The Court should review and resolve this latest attempt at avoiding use tax obligations.

CONCLUSION

For these reasons, the Court should grant the petition for the writ of certiorari and, upon review, the decision of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted,

ERNEST D. PREATE, JR.
Attorney General

BY: JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

DATE: September 3, 1991

APPENDIX

IN THE SUPREME COURT
OF PENNSYLVANIA
Middle District

BLOOMINGDALE'S BY MAIL LTD.	:	No. 3 M.D. Appeal Dkt. 1990
v.	:	Appeal from order of Commonwealth Court entered December 18, 1989, at No. 2345 C.D. 1985 ___ Pa. Commw. ___, ___ A.2d ___, (1989)
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE and EILEEN H. McNULTY, as Acting Secretary of Revenue, Commonwealth of Pennsylvania, Department of Revenue,	:	
Appellants	:	Argued; May 7, 1991

ORDER

PRE CURIAM: FILED: June 4, 1991

Order affirmed.

Mr. Chief Justice Nix did not particpate in the consideration or decision of this case.

Mr. Justice Flaherty and Mr. Justice Cappy dissent and would dismiss the appeal as moot.

JUDGMENT ENTERED

MILDRED E. WILLIAMSON
DEPUTY PROTHONOTARY

BLOOMINGDALE'S BY MAIL, LTD.,	:	IN THE COMMONWEALTH COURT OF
Petitioner	:	PENNSYLVANIA
v.	:	No. 2345 C.D. 1985
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE, and BARTON A. FIELDS, in his capacity as Secretary of Revenue, Commonwealth of Pennsylvania, Department of Revenue,	:	
Respondents	:	

BEFORE:

HONORABLE JAMES CRUMLISH, JR., President Judge
HONORABLE DAVID W. CRAIG, Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE FRANCIS A. BARRY, Judge
HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge

ARGUED: September 13, 1989

OPINION BY JUDGE SMITH

FILED: December 18, 1989

Petitioner Bloomingdale's By Mail, Ltd. (By Mail) filed the present action for declaratory judgment before this Court in its original jurisdiction pursuant to Section 761(a)(1) of the Judicial Code, 42 Pa. C.S. §761(a)(1) and Section 7532 of the Declaratory Judgments Act, 42 Pa. C.S. §7532. The principle question presented is whether the attempt by the Department of Revenue (Department) to require By Mail to collect and remit Pennsylvania use tax on its mail-order sales of taxable merchandise purchased by residents of the Commonwealth of Pennsylvania violates the due process or commerce clauses of the United States Constitution.

By letter dated March 25, 1985, from the Department, By Mail was provided

with a sales, use and hotel occupancy tax license application and instructed to complete it. In that letter and again in a letter dated July 10, 1985, the Department instructed By Mail to commence collection and remittance of use tax on its sales of merchandise to Pennsylvania residents. By Mail refused and continues to refuse to collect the Pennsylvania use tax on its sales. On August 29, 1985, By Mail filed its petition for review in the nature of a complaint for equitable relief and declaratory judgment against the Department. The parties thereafter entered into a stipulation of facts and supplemental stipulation of facts, and on the basis of these stipulations, the Department filed its motion for summary judgment. By Mail filed its answer and cross-motion for summary judgment.

Summary relief can be granted only where no material fact is in dispute and where the applicant's right to relief is clear. Gartner v. Pennsylvania Board of Probation and Parole, 79 Pa. Commonwealth Ct. 141, 469 A.2d 697 (1983). The issuance of a declaratory judgment is a matter of judicial discretion which should only be exercised to illuminate an existing right, status or legal relation. It may not be used to search out new legal doctrine. Doe v. Johns-Manville Corp., 324 Pa. Superior Ct. 469, 471 A.2d 1252 (1984). The Declaratory Judgments Act is broad in scope and is to be liberally construed and administered but is not without its limitation. Id.

I

The parties have stipulated, inter alia, to the following facts: By

Mail is a corporation organized and existing under the laws of the state of New York. The officers and directors of By Mail are located in New York City, New York, Cincinnati, Ohio and Chesire, Connecticut, and corporate headquarters are located in New York City and Chesire. By Mail conducts a nationwide mail order business from leased facilities in Salem, Virginia and from its wholly-owned fulfillment center in Chesire, Connecticut. Written or telephone purchase orders from persons throughout the United States, including residents of Pennsylvania, are received at these facilities and merchandise is shipped therefrom by common carrier or U.S. mail to fill these orders. Customers may return items to By Mail for a full refund or an exchange if they are dissatisfied with the merchandise for any

reason. By Mail is a wholly-owned subsidiary of Federated Department Stores, Inc. (Federated) which is a Delaware Corporation with its corporate headquarters in Cincinnati, Ohio. Prior to the incorporation of By Mail in 1983, the Bloomingdale's division (Bloomingdale's) of Federated made mail order sales to Pennsylvania residents.

Purchases made from By Mail may be paid for using Master Card, Visa, Diners Club and the Bloomingdale's credit card. By Mail has no retail stores anywhere and does not have any distribution house, sales house, warehouse, business location, office or employees in Pennsylvania. In addition, By Mail catalogs are not designed, prepared, printed, published, nor mailed from Pennsylvania and all merchandise is shipped to Pennsylvania customers from

Virginia or Connecticut. By Mail's only direct solicitations of Pennsylvania residents are through its catalogs distributed throughout the United States which refer customers to By Mail's fulfillment center in Connecticut for customer assistance, merchandise return or exchange, or other services. Bloomingdale's, however, operates retail stores in Pennsylvania and employs individuals in Pennsylvania to make sales of its merchandise to Pennsylvania customers.

On two separate occasions in 1986, employees of the Department purchased watches from By Mail catalogs using Visa charge cards to pay for the purchases. Included with each purchase was a merchandise return form which stated that returns were to be sent to By Mail at its Virginia location. Instead

of returning their watches to Virginia, the Department employees returned the watches to Bloomingdale's in King of Prussia and Willow Grove, Pennsylvania which accepted the returns. Refunds, which included Pennsylvania sales tax, were mailed from Bloomingdale's in New York. A third employee of the Department visited Bloomingdale's in Willow Grove and noticed that items in the catalog were also contained on shelves in the store and that the sales motifs of the Bloomingdale's store and the By Mail catalog were the same.

By Mail is not licensed to collect and does not collect Pennsylvania use taxes on its sales of goods to residents of Pennsylvania. However, in Virginia, New York and Connecticut, By Mail charges, collects and remits sales tax on all its taxable sales. From 1984

until the present, members of Federated's Board of Directors and corporate officers have been and are presently also members of the Board of Directors and corporate officers of By Mail.

II

By Mail asserts that imposition upon it of Pennsylvania use tax collection obligations violates the due process or commerce clause of the United States Constitution because By Mail has no nexus with Pennsylvania. The Department, on the other hand, asserts that By Mail maintains a place of business in the Commonwealth within the meaning of Section 201(b) of the Tax Reform Code of 1971[1] since it advertises

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[1] Act of March 4, 1971, P.L. 6, 72 P.S. §7201(b).

for sale and does sell its merchandise in this state and has two affiliated stores in Pennsylvania which accept the return of merchandise purchased from By Mail.

At the outset, it should be noted that all states that impose sales taxes on goods purchased within a state also impose a corresponding use tax on goods purchased out of state in order to protect sales tax revenues and put local retailers on a competitive level with out-of-state retailers who are exempt from sales tax. L.L. Bean, Inc. v. Department of Revenue, 101 Pa. Commonwealth Ct. 435, 516 A.2d 820 (1986); see also National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977). Section 201(b)(3) of the Tax Reform Code of 1971 provides that an out-of-state corporation will be deemed to be

maintaining a place of business in the Commonwealth and therefore subject to use tax collection duties if it is:

> [r]egularly or substantially soliciting orders within the lease, sale or delivery of tangible personal property to or the performance thereon of services for residents of this Commonwealth by means of catalogues or other advertising, whether such orders are accepted within or without this Commonwealth.

72 P.S. §7201(b)(3). As this Court has previously stated:

> [n]ot every out-of-state seller can be held liable for obtaining payment for use tax without a constitutional violation occurring. Such a collection burden when placed upon an out-of-state seller necessarily triggers due process concerns as well as imposes a restraint upon interstate commerce.

L.L. Bean, 101 Pa. Commonwealth Ct. at 443-44, 516 A.2d at 824.

The controlling question in determining whether a state tax comports with due process requirements is whether the state has given anything for which it can ask return. National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967). Regarding the burden on interstate commerce, the U.S. Supreme Court has held that "[s]tate taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." Id. 386 U.S. at 756 (quoting Freeman v. Hewit, 329 U.S. 249, 253 (1947), rehearing denied, 329 U.S. 832 (1946)). Therefore, when assessing the constitutionality of imposing use tax collection duties on an out-of-state seller, the principal inquiry is whether there exists a

definite link or some minimum connection between the state and the person, property or transaction that the state seeks to tax. L.L. Bean, 101 Pa. Commonwealth Ct. at 444, 516 A.2d at 824; see also National Bellas Hess and Miller Brothers Co. v. Maryland, 347 U.S. 340, rehearing denied, 347 U.S. 964 (1954) where the Supreme Court prohibited imposition of tax obligations where the only contacts were through the mail or common carrier and occasional advertising flyers and where no retail stores were present in the taxing state.

Sufficient nexus between a state and the property the state seeks to tax is found when local agents of the seller are present in the taxing state. General Trading Co. v. State Tax Commission of the State of Iowa, 322 U.S. 335 (1944); Felt & Tarrant Manufacturing Co. v.

Gallagher, 306 U.S. 62 (1939). When a seller has retail stores present in the taxing state, a similar result is reached. Nelson v. Montgomery Ward & Co., 312 U.S. 373 (1941), rehearing denied, 312 U.S. 716 (1941); Nelson v. Sears, Roebuck & Co., 312 U.S. 359, rehearing denied, 312 U.S. 715 (1941). In National Geographic, the Supreme Court held that sufficient nexus existed to support state taxation because the state had given something for which it could ask something in return -- National Geographic maintained two offices in the state which solicited advertisements and received the benefit of municipal protection.

In L.L. Bean, an out-of-state mail order firm sold and shipped to the V. F. Corporation (a Pennsylvania corporation that operates outlet stores

in Pennsylvania) L.L. Bean goods that had been returned to the company by its customers as well as overruns, second quality merchandise and discontinued items. L.L. Bean's only connections with Pennsylvania other than sales to V. F. were three trips which L.L. Bean representatives made to V. F. to discuss improving the sale and delivery of L.L. Bean merchandise and to insure that accounting procedures were carried out properly and that there was no trademark infringement by V. F. This Court held that the firm's mailings and catalog sales did not constitute a nexus necessary to impose a duty to collect use taxes.

III

While the present matter goes beyond Miller Brothers, National Bellas Hess and L.L. Bean, the facts

nevertheless support a declaration that "no nexus" exists with this Commonwealth which would allow the imposition of use tax collection obligations upon By Mail. The Department asserts that courts have held that a nexus exists where the affiliated in-state corporation is not directly related to the mail order business from which tax collection is sought. See, e.g., Reader's Digest Association, Inc. v. Mahin, 44 Ill. 2d 354, 255 N.E. 2d 458, cert. denied, 399 U.S. 919 (1970). In Reader's Digest, the court held that the activities and in-state presence of several of the subsidiaries of Reader's Digest in Illinois subjected it to use tax liability even though the corporation itself maintained no office, sales house, or property in the state. The court however found that a nexus existed

because the subsidiaries of Reader's Digest were actively soliciting orders in the state on behalf of Reader's Digest, which constituted a presence in the state. Reader's Digest, however, does not support a finding of a nexus here as argued by the Department because Bloomingdale's stores in Pennsylvania do not solicit orders on By Mail's behalf nor act as its agents in any fashion and By Mail does not solicit orders for Bloomingdale's.

Although the Department has documented two instances in which customers of By Mail were able to return merchandise purchased through the catalog at a Bloomingdale's department store, these returns at the store appear to be aberrations from normal practice. Deposition of William Gordon, pp. 45-50; Deposition of Barbara Ann Duffy, pp.

47-48. The Department further makes much of the fact that By Mail and Bloomingdale's employ the same advertising themes and motifs.[2] Absent something more, this Court fails to see how such a similarity can constitute a nexus for use tax purposes.

The Department also argues that By Mail's separate corporate existence from Bloomingdale's department stores is a mere legal formality which cannot control constitutional considerations[3]

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[2] "California, The New International Style" was the Spring 1989 theme for Bloomingdale's stores as well as By Mail's catalogs. Department Exhibits P and Q.

[3] Pursuant to service agreements between By Mail and Bloomingdale's, By Mail is responsible for all expenses incurred in the operation of its business. By Mail is charged a fee for services performed for it by Bloomingdale's, including the use of the name and logo "Bloomingdale's."

and, in essence, that Bloomingdale's acts as an agent or representative for By Mail. To support this contention, the Department relies upon Scripto, Inc. v. Carson, 362 U.S. 207 (1960). In Scripto, the Supreme Court found that adequate nexus existed to impose tax obligations where the taxpayer paid ten resident wholesalers to solicit substantial orders in the state on its behalf. In doing so, the Supreme Court found that Scripto could not avoid tax obligations in the state simply by characterizing its solicitors as "independent contractors" rather than as "employees." Clearly, By Mail does not have agents acting on its behalf in Pennsylvania. Under Pennsylvania law, the burden of establishing the existence of an agency relationship rests on the party making that assertion. Scott v. Purcell, 490

Pa. 109, 415 A.2d 56 (1980). A true agency relationship results only if there is an agreement for the creation of a fiduciary relationship with control by the principal. Mapp v. Gimbel's Department Store, 373 Pa. Superior Ct. 210, 540 A.2d 941 (1988). However, "agency will not be assumed from the mere fact that one does an act for another." Reifsnyder v. Dougherty, 301 Pa. 328, 333, 152 A. 98, 100 (1930).[4]

An examination of the stipulated facts of record demonstrates that a sufficient nexus has not been established between By Mail and the Commonwealth of

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[4] The Pennsylvania Supreme Court has held that a parent/subsidiary relationship with nothing more will not justify disregarding the separate corporate identity and applying a rule different from the normal one. Commonwealth v. Hellertown Manufacturing Co., 438 Pa. 134, 264 A.2d 382 (1970).

Pennsylvania to impose use tax collection obligations upon By Mail. Accordingly, By Mail is not responsible for collecting use tax on its mail-order sales to Pennsylvania residents, and the Department's attempt to impose such a duty violates the United States Constitution. Summary judgment is therefore entered in favor of By Mail, and the Deparment's motion for summary judgment is denied.

_____

DORIS A. SMITH, Judge

BLOOMINGDALE'S BY MAIL, LTD.,	:	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
Petitioner	:	
v.	:	No. 2345 C.D. 1985
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE, and BARTON A. FIELDS, in his capacity as Secretary of Revenue, Commonwealth of Pennsylvania, Department of Revenue,	:	
Respondents	:	

ORDER

AND NOW, this 18th day of December, 1989, it is hereby declared that the imposition of the obligation to collect Pennsylvania use taxes upon Bloomingdale's By Mail Ltd. on its mail-order sales to Pennsylvania residents violates the United States Constitution, and Bloomingdale's By Mail, Ltd. motion for summary judgment is

therefore granted. The motion for summary judgment filed by the Department of Revenue is denied.

DORIS A. SMITH, Judge

(2)

No. 91-383

FILED
OCT 25 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF REVENUE, and
EILEEN MCNULTY, Secretary of Revenue,
Petitioner,

v.

BLOOMINGDALE'S BY MAIL LTD.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

MEMORANDUM OF RESPONDENT BLOOMINGDALE'S BY MAIL LTD.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should overrule its longstanding decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), under which states can impose use tax collection obligations on out-of-state businesses only if they have a "physical presence" in the state.

2. Whether a state court decision interpreting state law to bar the attribution of activities of a related corporation to the respondent (for purposes of determining its "physical presence" within the state) rests on an independent and adequate state ground.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-383

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF REVENUE, and
EILEEN MCNULTY, Secretary of Revenue,
Petitioner,

v.

BLOOMINGDALE'S BY MAIL LTD.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

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MEMORANDUM OF RESPONDENT BLOOMINGDALE'S BY MAIL LTD.

STATEMENT

Bloomingdale's By Mail Ltd. ("By Mail")[1] is a New York corporation[1] that conducts a mail order business from its wholly-owned fulfillment center in Cheshire, Connecticut.[2] Pet. App. 6a. It is wholly-owned by Federated Department Stores, Inc. ("Federated"), a Delaware corporation headquartered in Cincinnati, Ohio. Pet. App. 7a.

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[1] Pursuant to Supreme Court Rule 29.1, the Court is advised that Bloomingdale's By Mail Ltd. is a wholly-owned subsidiary of Federated Department Stores, Inc. Bloomingdale's By Mail Ltd. has no subsidiaries.

[2] Prior to May, 1987, By Mail's fulfillment center was located in Salem, Virginia. Unless otherwise noted, references will be to the Connecticut center where all orders are currently filled.

By Mail solicits sales by sending catalogs to prospective customers nationwide, including customers in Pennsylvania. Pet. App. 6a. Customers place orders for merchandise displayed in the catalogs by contacting By Mail directly in Connecticut by mail or by using a toll-free "800" number. *Id.* By Mail then ships the merchandise from Connecticut to these purchasers by common carrier or United States mail. *Id.* By Mail refers its customers to its Connecticut fulfillment center for customer assistance, merchandise return or exchange, and all other customer services. Pet. App. 8a.

At the time of the assessment, By Mail maintained no physical presence whatsoever in Pennsylvania; it conducted all of its business activities from its principal place of business in Cheshire, Connecticut. Pet. App. 6a. By Mail did not operate retail stores, and did not maintain or use any office, distribution house, sales house, warehouse, service enterprise or other place of business in Pennsylvania. Pet. App. 7a. By Mail did not have any solicitors, salesmen, agents or representatives in Pennsylvania. Pet. App. 20a. By Mail had no inventory or merchandise in the state, and was not licensed to do business in Pennsylvania. R. 169a.[3] By Mail had no telephone listing or bank accounts in Pennsylvania, did not retain security interests in any goods sold to Pennsylvania residents, and did not investigate credit or collect accounts in Pennsylvania. R. 169a. By Mail did not design, prepare, print, publish or mail its catalogs in or from Pennsylvania. Pet. App. 7a. By Mail's only contacts with Pennsylvania occurred through the mail, common carriers, and "800" telephones lines.

By Mail's parent company, Federated, also operated retail stores in Pennsylvania through its Bloomingdale's

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[3] The designation "R. ——" refers to the reproduced record filed in the Pennsylvania Supreme Court.

Division.[4] By Mail and Bloomingdale's were separate corporations. The management decisions and day-to-day operations of each corporation were conducted separately, and By Mail was responsible for all expenses incurred in the operation of its business. Pet. App. 19a. To the extent that By Mail obtained financial, legal, real estate or other services from its parent, Federated, it paid a fee for these services pursuant to written agreements. *Id.* By Mail paid a fee to Bloomingdale's for the use of the "Bloomingdale's" trade name and logo. *Id.*

By Mail's customers were not instructed to obtain service or return mail order merchandise to the Bloomingdale's stores; they were instructed to return merchandise directly to By Mail in Connecticut. Pet. App. 8a, R. 171a. As a matter of policy, all customer service was provided at By Mail's Connecticut location and any isolated variation therefrom was an "aberration from normal practice." Pet. App. 18a.

Pennsylvania imposes a tax on the "use . . . within [the] Commonwealth of tangible personal property purchased at retail." Pa. Stat. Ann. tit. 72, § 7202(b) (Purdon 1990). The liability for the tax rests with the consumer, but a person "maintaining a place of business in [the] Commonwealth" is obligated to collect the tax and remit it to Pennsylvania's taxing authorities. *Id.* § 7237(b)(1). The term "[m]aintaining a place of business in [the] Commonwealth" is defined to require either the direct or indirect use of an "office, distribution house, sales house, warehouse, service enterprise, or other place of business" in Pennsylvania, or the presence of a "solicitor, salesman, agent or representative" in Pennsylvania. *Id.* § 7201(b)(1), (2). An out-of-state corporation will

[4] Since July 29, 1988, the Bloomingdale's Division of Federated was separately incorporated as Bloomingdale's Inc. (R. 170a). The term "Bloomingdale's" refers to Bloomingdale's stores originally operated as a division of Federated, and then later incorporated as a separate corporation.

also be deemed to be "maintaining a place of business in the Commonwealth" if it is "[r]egularly or substantially soliciting orders within [Pennsylvania] in connection with the lease, sale or delivery of tangible personal property . . . to residents of [Pennsylvania] by means of catalogues or other advertising . . . ." *Id.* § 7201(b)(3) (cited at Pet. 3-7).

In March 1985 the Pennsylvania Department of Revenue (the "Department") notified By Mail that it must register with the Department and begin collecting Pennsylvania use tax on its mail order sales to Pennsylvania residents because it met the definition of a "person maintaining a place of business in the Commonwealth." Pet. App. 3a-4a. The Department also asked By Mail to produce records of By Mail's sales transactions with Pennsylvania customers, or to notify customers directly that use tax was due on the mail order sales. R. 180a. By Mail took the position that the attempt to impose these duties was an unconstitutional application of Pennsylvania law. By Mail then filed a declaratory judgment action in the Commonwealth Court of Pennsylvania, asking the court to declare that By Mail could not constitutionally be required to comply with any of the Department's requests, and could not constitutionally be required to collect or pay Pennsylvania use tax. Pet. App. 3a-4a.

The Commonwealth Court of Pennsylvania, sitting *en banc* as a court of original jurisdiction, unanimously held that the Department's attempt to require By Mail to collect Pennsylvania use tax on its mail order sales to Pennsylvania residents violated the United States Constitution because By Mail lacked sufficient nexus with Pennsylvania. Pet. App. 21a-22a. The Commonwealth Court applied *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), to find that By Mail lacked nexus with Pennsylvania. In addition to declining to depart from *Bellas Hess* and by finding By Mail's activities did not create a physical presence in the state,

the court also rejected the Department's alternative argument that By Mail had sufficient nexus with Pennsylvania because "it has two affiliated stores in Pennsylvania." Pet. App. 11a. The Department urged the court to ignore By Mail's separate corporate status and attribute the Pennsylvania presence of the Bloomingdale's stores to By Mail. This the court declined to do, stating that "a parent/subsidiary relationship with nothing more will not justify disregarding the separate corporate identity." Pet. App. 21a.

The court also rejected the Department's claim that nexus existed because the Bloomingdale's stores "act as an agent or representative for By Mail." Pet. App. 20a. After reviewing Pennsylvania agency law and the stipulated facts of record, the court refused to find that the Bloomingdale's stores acted as By Mail's agents in Pennsylvania because the standards applied by the Pennsylvania courts to establish an agency relationship had not been met. Pet. App. 20a-21a. As the court explained, under Pennsylvania law, "a true agency relationship results only if there is an agreement for the creation of a fiduciary relationship with control by the principal." Pet. App. 21a (citations omitted). The in-state presence of the separate Bloomingdale's stores was irrelevant for determining By Mail's tax nexus, inasmuch as the Department failed to prove that an agency relationship existed between them under Pennsylvania law. Absent such a relationship, the court was unwilling to "disregard[] the separate corporate identity" and impute the activities of the Bloomingdale's stores to By Mail. Pet. App. 21a.

The Department appealed the decision to the Pennsylvania Supreme Court, which affirmed the lower court's decision without opinion. Pet. App. 1a.[5] The Pennsyl-

[5] In the Pennsylvania Supreme Court two Justices dissented, stating that they "would dismiss the appeal as moot." Pet. App. 1a. In the Pennsylvania Supreme Court, By Mail had noted that it had

vania Supreme Court did not specifically address the Department's express argument that *Bellas Hess* was no longer controlling. This petition followed.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI LIMITED TO QUESTION 1 IN THE PETITION

I. QUESTION 1—WHETHER THIS COURT SHOULD OVERRULE ITS DECISION IN *NATIONAL BELLAS HESS v. DEPARTMENT OF REVENUE*, 386 U.S. 753 (1967)—MERITS THIS COURT'S REVIEW

Since the filing of this petition, this Court has granted certiorari in No. 91-194, *Quill Corp. v. North Dakota*, limited to the first question in that petition, namely:

> Whether the North Dakota Supreme Court is obligated to follow the longstanding precedent of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), in a case that is factually indistinguishable from *Bellas Hess*?

60 U.S.L.W. 3221 (U.S. cert. granted Oct. 7, 1991)

In *Quill*, the North Dakota Supreme Court refused to follow this Court's 1967 decision in *Bellas Hess*, finding that "the foundational basis of *Bellas Hess* has been eroded and that the Supreme Court would so conclude." *Quill Corp. v. North Dakota*, No. 91-194, Pet. App. A13. The North Dakota court held that "the tremendous social, economic, commercial, and legal innovations since 1967" had made *Bellas Hess* "an obsolescent precedent." *Quill*, Pet. App. A10. The petition in that case argued

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registered to collect the Pennsylvania use tax on May 1, 1991, because it had opened a By Mail retail outlet in the Commonwealth. The Commonwealth urged that the relief that it sought was not limited to prospective relief, and that the relief encompassed past tax liability. The majority of the Pennsylvania Supreme Court evidently agreed that the pleading should be construed to state a claim for liability for some past period.

that certiorari be granted in part because of a conflict with the decision of the Pennsylvania Supreme Court in this case. *See* Petition for Certiorari *Quill Corp. v. North Dakota*, No. 91-194 at 19-20 (filed Aug. 2, 1991).

In this case, petitioners urge that *Bellas Hess* be reconsidered, presenting as Question 1 in their petition:

> Whether the holding in *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967)—that mail-order sellers are exempt from collecting state use taxes unless they have some physical presence within the taxing State—should be reconsidered in light of the technological and other changes in the 24 years since *National Bellas Hess* was decided?

Pet. at i.

We agree that the decision below is based on adherence to this Court's decision in *Bellas Hess* and that, if this Court were to overrule *Bellas Hess* in the *Quill* case, this case would have to be reconsidered in light of *Quill*. Under these circumstances we would ordinarily agree that this case should be held pending this Court's decision in *Quill*. But because of factual differences between this case and *Quill* which could influence this Court's reevaluation of *Bellas Hess*, the Court would be best served by granting certiorari in this case as well, limited to Question 1 in the Petition.[6]

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[6] By Mail notes that a number of cases addressing this issue are pending or have recently been decided. *See, e.g., SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn.), *cert. denied sub nom. Connecticut Commissioner of Revenue Services v. SFA Folio Collections, Inc.*, 111 S. Ct. 2839 (1991); *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn.), *cert. denied*, 111 S. Ct. 77 (1990); *Direct Marketing v. Bennett*, No. Civ. S-88-1067 (E.D. Cal. July 12, 1991) (1991 U.S. Dist. LEXIS 10736) (notice of appeal filed 9th Cir. July 16, 1991); *Bloomingdale's By Mail Ltd. v. Huddleston*, No. 89-3017-II (Tenn.—Davidson Cty. Ch. Ct. March 8, 1991) (appeal pending); *SFA Folio Collections, Inc. v. Huddleston*, No. 89-3015-III (Tenn.—Davidson Cty. Ch. Ct. March 11, 1991) (placed on inactive status pending appeal in *Bloomingdale's By Mail Ltd. v. Huddleston*). By

While there are many similarities between this case and *Quill*, there are also substantial differences. First, the North Dakota court found that Quill owned property in the state, because it licensed to some of its North Dakota residents a computer software program, Quill Service Link ("QSL"), which permits customers direct computer access to Quill's computer. The court held that "[t]hrough its licensing agreement, Quill clearly retains rights to property situated in North Dakota, providing further nexus with the State." *Quill*, Pet. App. A29. The North Dakota court relied on this additional ground in its decision below. *See Quill*, Pet. App. A29-A30. If the decision of this Court in *Quill* were to rest on this alternative ground, the interests of all parties in securing a definitive determination of the continued validity of *Bellas Hess* would be frustrated.

Second, the mail order operations of Quill and By Mail are distinguishable in another respect. Unlike Quill, which sells its office supplies and equipment almost exclusively to businesses, By Mail (and the vast number of mail order sellers) sell to the public at large. This difference in client base may be significant, because sellers encounter additional compliance difficulties when dealing with the general public instead of business establishments. Forcing mail order companies such as By Mail to collect and remit use tax on sales to the general public would entail the same significant compliance burdens that led the Court in *Bellas Hess* to invalidate such requirements when there was no physical presence in the State. The Court held that "[t]he many variations in rates of tax in allowable exemptions, and in administrative and recordkeeping requirements could entangle Na-

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Mail is the appellant in *Bloomingdale's By Mail v. Huddleston*. The chancery court in that case determined that it was not bound by *Bellas Hess*, and By Mail has appealed that decision to the Tennessee Supreme Court. Oral argument in that appeal took place October 3, 1991.

tional [Bellas Hess'] interstate business in a virtual welter of complicated obligations . . . ." *Bellas Hess*, 386 U.S. at 759-60 (footnotes omitted). While many of these same burdens exist when selling to business customers, additional significant problems are presented for firms collecting tax on sales to members of the general public, who make individual purchases in smaller amounts and who are not nearly as sophisticated as business customers. Under such circumstances the calculation of tax and exemptions by customers is prone to error, and mail order businesses encounter substantial difficulties in collecting and remitting the tax actually due from the customer.

This Court would be well served in this important area if it were to have before it two cases presenting differing factual circumstances which would illuminate the basic issue. In similar circumstances this Court has often granted more than one petition for certiorari.

II. THIS COURT SHOULD NOT GRANT CERTIORARI ON QUESTION 2 SINCE IN THIS RESPECT THE DECISION BELOW RESTS ON AN INDEPENDENT AND ADEQUATE STATE GROUND

Although petitioner primarily contends that this Court should "reconsider" and overrule its decision in *Bellas Hess*, petitioner also raises an alternate ground for review. Petitioner contends that By Mail has sufficient nexus with Pennsylvania, even under the *Bellas Hess* rule of physical presence, because By Mail should be deemed to share the nexus that the affiliated Bloomingdale's Division stores have with Pennsylvania. *See* Pet. 29-32. Petitioner raises this alternate ground in Question 2 of the petition:

> Whether, even under *National Bellas Hess*, a mail-order seller is exempt from collecting state use taxes where the seller, although separately incorporated, is closely tied to a well-known retailer with stores in the taxing State, and uses that retailer's name and logo?

Pet. at i.

The Pennsylvania Commonwealth Court[7] treated this issue purely as a question of state corporate and agency law. As a result, the court's decision on this point rests on an adequate and independent state ground and is not subject to further review by this Court. *See generally*, R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* § 3.25 at 168 (6th ed. 1986).

The state court's opinion relied solely on principles of Pennsylvania corporate and agency law in refusing to impute the activities of Bloomingdale's to By Mail. The Pennsylvania Commonwealth Court clearly treated the "affiliate nexus" theory as an issue of state law when it relied on traditional principles of corporate law and refused to treat By Mail's separate corporate status as a "mere legal formality." Pet. App. 19a. The court declined to impute nexus to By Mail solely because affiliated stores were located in the state, noting that "[t]he Pennsylvania Supreme Court has held that a parent/subsidiary relationship with nothing more will not justify disregarding the separate corporate identity and applying a rule different from the normal one." Pet. App. 19a, 21a.

Equally clear is the court's extensive consideration and application of traditional state agency principles in reaching its result:

> Clearly, by Mail does not have agents acting on its behalf in Pennsylvania. Under Pennsylvania law, the burden of establishing the existence of an agency relationship rests on the party making that assertion. *Scott v. Purcell*, 490 Pa. 109, 415 A.2d 56 (1980). A true agency relationship results only if there is an agreement for the creation of a fiduciary relationship with control by the principal. *Mapp v.*

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[7] The Pennsylvania Supreme Court affirmed the lower court's opinion without decision. Thus, the substantive basis for the Court's review in this case is supplied by the decision of the Pennsylvania Commonwealth Court.

> *Gimbel's Department Store*, 373 Pa. Superior Ct. 210, 540 A.2d 941 (1988). However, "agency will not be assumed from the mere fact that one does an act for another." *Reifsnyder v. Dougherty*, 301 Pa. 328, 333, 152 A. 98, 100 (1930).

Pet. App. 20a-21a. Relying on these principles, the court concluded that Pennsylvania lacked nexus with By Mail because the "Bloomingdale's stores in Pennsylvania do not solicit orders on By Mail's behalf nor act as its agents in any fashion." Pet. App. 18a.

The decision shows that the Pennsylvania Commonwealth Court relied exclusively on state principles of corporate and agency law to find that the in-state presence of the Bloomingdale's Division stores was irrelevant to By Mail's tax liability in Pennsylvania. Inasmuch as the Pennsylvania court disposed of the affiliate nexus theory solely on state law grounds, petitioner cannot now resurrect this theory as an alternate ground for review. *See, e.g., Klinger v. Missouri*, 80 U.S. (13 Wall.) 257, 263 (1871); *see also Michigan v. Long*, 463 U.S. 1032, 1037-39 (1983); *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977).

CONCLUSION

The Court should grant certiorari in this case, limited to Question 1 of the petition. If the Court instead desires to hold this case in light of *Quill Corp. v. North Dakota*, No. 91-194, we respectfully request both parties be provided an opportunity to address the appropriate disposition of this case following the Court's decision in *Quill*.

Respectfully submitted,

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